

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 20, 2018 appellant, then a 44-year-old sales and service associate and distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a stress fracture of her left foot causally related to factors of her federal employment including, long periods of standing and walking over five miles a day with heavy packages. She indicated her inability to treat swelling and edema in foot while at work. Appellant noted that she first became aware of her condition on May 16, 2017 and realized its relation to her federal employment on January 15, 2018.

In a February 20, 2018 statement, appellant described her employment duties and the development of her symptoms. She indicated that, in May 2017, she sought medical care and was placed in an orthopedic boot and directed by her doctor to stay off her foot for at least one month. Appellant further indicated that she stayed off work for one month and went back to work in June 2017 because her manager advised that he would accommodate her. She described the specific duties she performed, which eventually required more walking around the building and which caused great pain. In September 2017, appellant's stress fracture became a full break and she underwent an open reduction internal fixation of the fifth metatarsal, calcaneal bone graft and mini fluoroscopy on October 10, 2017 performed by Dr. Scott Shawen, a Board-certified orthopedic foot and ankle surgeon.

By decision dated May 3, 2018, OWCP accepted the claim for nondisplaced fracture of fifth metatarsal bone, left foot, nonunion. It paid appellant compensation benefits for temporary total disability as of October 10, 2017, the date of her surgery.

On June 7, 2018 OWCP received multiple claims for compensation (Form CA-7) claiming intermittent disability from work during the period June 24, 2017 through May 25, 2018.

OWCP received a June 5, 2017 report from a physician assistant, physical therapy reports dated June 12, September 11, 21, and 27, 2017, and a September 29, 2017 report from Dr. Scott Shawen, a Board-certified orthopedic foot and ankle surgeon, who related that x-rays of appellant's left ankle demonstrated a fifth metatarsal Jones-type fracture with nonunion and that appellant wished to proceed with surgery.

In a June 14, 2018 development letter, OWCP advised appellant of the deficiencies in the evidence received for the entire period claimed for dates prior to the October 10, 2017 surgery. It requested additional medical evidence to establish that she was disabled from all work for the specific dates claimed between June 24 through October 9, 2017. OWCP afforded appellant 30 days to submit the requested evidence.

OWCP received work excuse slips for dates prior to June 14, 2017. In a July 10, 2017 medical note, Dr. Lowell Gill, a Board-certified orthopedic surgeon, noted no walking or standing

more than 10 minutes at a time and that appellant should elevate her left leg most of day for six weeks. In a July 12, 2017 slip, he noted that she could not return to work for another week. In a September 29, 2017 report, Dr. Shawen noted that appellant should not return to work for three months, noting that she would be nonweight bearing for two months after surgery and totally incapacitated.

By decision dated August 10, 2018, OWCP denied appellant's intermittent disability claim for the period June 24 through October 9, 2017. It found that the medical evidence was insufficient to establish disability from work due to the accepted left foot condition.

In a September 7, 2018 letter, appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held *via* teleconference on January 23, 2019. Additional reports from Dr. Gill dated June 13, July 5 and 12, and August 23, 2017 reports were submitted. In his June 13, 2017 report, Dr. Gill noted that appellant came in for a second opinion regarding her severe foot pain. He indicated that she worked at the employing establishment, that she was on her feet all day, and that she reported that work makes her pain worse. Dr. Gill provided examination findings, noting that the main problem was marked tenderness at the insertion site of the peroneus brevis. He provided an impression of enthesopathy with peroneus brevis insertion into the fifth metatarsal space and possible, but doubtful, peroneal tendon tear as she had good strength with eversion. Dr. Gill provided an injection and recommended casting and refraining from excess physical activity of her lower extremities. He also noted his agreement with appellant that her work appeared to aggravate her symptomatology, which was severe. Dr. Gill opined that she remain out of work for a month. In a July 5, 2017 progress report, he provided an impression of persistent peroneal insertional tendinitis left foot, possible partial peroneal tendon tear, and bilateral piriformis syndrome -- posterior trochanteric bursitis. In a July 12, 2017 note, Dr. Gill indicated that appellant needed another week out of work. In an August 23, 2017 report, he provided an impression of insertional tendinitis peroneus brevis left foot and noted that appellant's pain was improving.

In a February 6, 2019 statement, appellant confirmed that, when the pain in her foot permitted, she worked full-time full duty and, at times, overtime during the period June 24 through October 9, 2017.

By decision dated April 8, 2019, OWCP's hearing representative affirmed the August 10, 2018 decision as modified. The hearing representative found that the evidence of record was insufficient to establish disability from work for the period June 24 through October 9, 2017 as appellant's physicians did not provide any medical rationale as to the basis of her disability from work. The hearing representative modified the decision to reflect that appellant was entitled to wage-loss compensation for up to four hours to attend the documented medical appointments on July 5, August 23, September 27, and 29, 2017.³

On April 8, 2020 appellant, through counsel, requested reconsideration. In his letter of even date, counsel contended that Dr. Gill's office notes were submitted in addition to the work

³ The hearing representative further found that no time loss was claimed for the physical therapy appointment on September 11, 2017 and that the September 21, 2017 physical therapy appointment was on appellant's fixed scheduled day off.

status notes. Counsel further contended that Dr. Gill's previously submitted reports supported an uncontroverted inference that appellant was disabled from work intermittently from June 24 through October 9, 2017 and required further development by OWCP. Copies of Dr. Gill's reports dated June 13, July 5 and 12 and August 23, 2017 were resubmitted.⁴

By decision dated April 24, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

⁴ On August 14, 2019 OWCP expanded the acceptance of appellant's claim to include the additional condition of temporary aggravation of bipolar disorder. It paid appellant on the periodic compensation rolls, effective August 18, 2019.

⁵ *Id.*

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D., id.*; *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see A.N.*, *supra* note 7; *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *see A.N., id.*; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant's reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. 10.606(b)(3).¹¹

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With her reconsideration request, appellant resubmitted copies of Dr. Gill's reports dated June 13, July 5 and 12, and August 23, 2017. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹² Thus, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹³

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹⁴

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹¹ *Supra* note 6; *see K.F.*, Docket No. 19-1846 (issued November 3, 2020).

¹² *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹³ *Supra* note 7; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

¹⁴ *See G.M.*, Docket No. 20-1485 (issued March 22, 2021); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board